In The

Supreme Court of the United States

October Term, 1979

No. 79-886

THE UPJOHN COMPANY and
GERARD THOMAS,
Petitioners,

v.

UNITED STATES OF AMERICA
and DAVID E. NOWAK, Special Agent,
Internal Revenue Service,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms in Support of Petitioners

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Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms in Support of Petitioners

This brief on the merits is filed with the consent of all parties on behalf of the American College of Trial Lawyers and the law firms whose names are subscribed at the end of the brief.

OPINIONS BELOW

The opinion of the court of appeals is reported at 600 F.2d 1223 and reprinted at p. 1a of the Petition Appendix. The opinion of the United States Magistrate is not officially reported but is unofficially reported at 41 A.F.T.R 2d 78-796 and 78-1 U.S.T.C. ¶ 9277 and reprinted at p. 9a of the Petition Appendix. The order of the district court adopting the Magistrate's opinion and the order of the district court enforcing the summons are not officially reported but are reprinted at p. 39a and p. 41a respectively of the Petition Appendix.

JURISDICTION

On December 7, 1979, petitioner filed a timely petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit. On March 17, 1980 this Court granted the petition. Jurisdiction is founded upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between attorneys for a corporation and corporate employees where the subject of the communications is a matter about which the attorneys' advice has been sought by the corporation and the communications relate to the performance by the employees of the duties of their employment.

2. Whether the work-product doctrine, developed in *Hickman v. Taylor*, 329 U.S. 495, and its progeny, provides a qualified immunity against disclosure of materials sought by a summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602.

INTERESTS OF THE AMICI CURIAE

The American College of Trial Lawyers is an organization of more than 3,000 lawyers and judges throughout

the United States dedicated to the improvement and enhancement of the standards of trial practice, the administration of justice and the ethics of the trial branch of the legal profession. The 33 law firms whose names are subscribed to this brief are regularly engaged in the representation of corporations and appear as amici curiae with the College because the issues presented by this case fundamentally affect their relationships with their clients and the responsibilities they have to their clients, the administration of justice and the legal profession.

Petitioners and respondents here must necessarily deal with the particular facts of this case and the respective interests of the parties to this litigation. The problems raised by the decision of the court below, however, are much broader in nature than the circumstances giving rise to this particular case, for they put in issue the very nature of the attorney-client privilege in the corporate setting, the applicability of the work-product doctrine to investigative proceedings involving individuals as well as corporations, and the functioning of our adversary system of justice. This brief will focus on the urgent need for the enunciation by this Court of a clear and workable definition of the attorney-corporate client privilege, consistent with the purpose recognized by this Court as underlying the privilege and accurately reflecting the ways in which modern corporations function and are held accountable under the law, and of standards for application of the work-product doctrine which are consistent with the responsibilities and role of counsel in an adversary system of justice.

STATEMENT OF THE CASE

The facts and proceedings below are fully set forth in petitioners' brief on the merits.

SUMMARY OF ARGUMENT

The Attorney-Client Privilege

The policy underlying the attorney-client privilege is to encourage full disclosure of information between clients and their attorneys, thereby enabling attorneys to discharge their professional duties effectively, the adversary system to function fairly, and clients to conform their activities to the law. In narrowly confining the scope of the attorney-corporate client privilege to communications of the client's "control group," the Sixth Circuit herein followed the Third and Tenth Circuits in adopting a test which is fundamentally at odds with the purpose of the privilege because it constricts the flow of information from corporate client to attorney.

The restrictions imposed by the control group test are inconsistent with the principles that govern a corporation's accountability for the acts of its agents and with the manner in which modern corporations seek out and assimilate legal advice. The test is incapable of prospective application because it limits the privilege to the communications of an ill-defined group, the "control group," and because it is subject to unpredictable shifts in application within a single corporation and within the context of a single legal problem. The test deprives society of the benefits of the privilege because it hinders efforts directed toward voluntary compliance with the law by impeding an attorney's ability to render candid and well-informed legal advice to a corporation by direct communication with employees for whose actions the corporation may be liable.

A second standard for the attorney-corporate client privilege, developed by the Seventh and Eighth Circuits, protects an employee's communication having as its subject matter the employee's performance of his duties when the disclosure is made at the direction of a corporate superior for the purpose of securing legal advice for the

company. The "subject matter" test is consistent with the purpose of the privilege because it takes into account the realities of modern corporate management and the principles of corporate accountability and because it is capable of prospective application. The test does not create a broad "zone of silence" as the court below contended since the *facts* communicated to an attorney remain discoverable from the corporation and from those employees in possession of the facts. Only the communication of those facts to the corporation's attorney and the attorney's advice with respect thereto is exempted from discovery. The subject matter test is consistent with sound public policy in that it will encourage corporations to maximize their efforts to comply with the law without diminishing the legitimate discovery rights of other litigants.

The Work-Product Doctrine

The court below stands alone in squarely holding that the work-product doctrine, developed in *Hickman v. Taylor*, 329 U.S. 495, and deemed essential to "the orderly prosecution and defense of legal claims" (329 U.S. at 510), is not available as a defense to an administrative summons. The Sixth Circuit's holding is contrary to the reasoning of this Court in *Hickman* and the holdings of several other federal courts; it is contrary to sound policy because it penalizes and, hence, discourages, through preparation of administrative cases; and it unwisely coerces attorneys into becoming witnesses against their clients without even requiring the agency to demonstrate a need to invade materials prepared in anticipation of litigation.

Moreover, the Sixth Circuit's apparent premise for its holding – that the broad-ranging inquisitorial powers of the IRS under 26 U.S.C. § 7602 make the work-product doctrine inapplicable – is defective because it fails to recognize the limitations on that power established by this Court. That premise also ignores the fact that numerous

lower federal courts have held that the doctrine is fully applicable to subpoenas issued by grand juries, whose inquisitorial powers are at least as broad as the IRS's.

The government's administrative interest in minimizing the efforts it is required to expend to obtain the information it seeks are clearly outweighed by the public interest in protecting the ability of attorneys vigorously to represent their clients. If the right to meaningful assistance of counsel is to be preserved in administrative investigations as well as in judicial proceedings, the applicability of the qualified immunity afforded by the work-product doctrine must be sustained.

ARGUMENT

I. THE TEST FOR THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE MUST BE PREMISED ON THE PURPOSE UNDERLYING THE PRIVILEGE AND NOT ON ANCILLARY CONCERNS UNRELATED TO THE PURPOSE.

The "wise and liberal policy," *Connecticut Mutual Life Ins. Co. v. Schaefer,* 94 U.S. 457, 458, dictating the protection of attorney-client communications, has been stressed repeatedly by this Court. "If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States v. Louisville & Nashville R.R.,* 236 U.S. 318, 336. *See also Hunt v. Blackburn,* 128 U.S. 464, 470; *Blackburn v. Crawfords,* 3 Wall. 175, 192-93; *Chirac v. Reinicker,* 11 Wheat. 280, 294.

The purpose of the attorney-client privilege is to insure full disclosure between client and attorney; the privilege must be "applied where necessary to achieve its purpose" so that the "ability to obtain informed legal advice will remain unfettered." *Fisher v. United States,* 425 U.S. 391, 402-404. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States,* ..... U.S. ....., 100 S. Ct. 906, 913.[1]

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[1] The policy articulated by this Court as underlying the privilege has also been recognized by lower courts and commentators. *See, e.g.,* the Comment to Rule 210 of the Model Code of Evidence (*ALI* 1942):

> In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity.

This Court not only has recognized that preservation of the privilege "is indispensable for the purposes of private justice," *Chirac v. Reinicker*, 11 Wheat 280, 294, but also has specified the analytical approach to be followed in resolving any controversy concerning the scope of the privilege. The Court has made clear that, while the privilege is to be narrowly construed, the scope of any test for its application must insure that the purpose underlying the privilege will be achieved. *Trammel*, ... U.S. at ....., 100 S. Ct. at 913; *Fisher*, 425 U.S. at 403-404. Thus, since the purpose of the attorney-client privilege is to enable the client to obtain legal advice based on the fullest possible understanding of the facts, *United States v. Louisville & Nashville R.R.*, 236 U.S. at 336; *Hunt v. Blackburn*, 128 U.S. 464, 470, the scope of the privilege must be such that it will "encourage clients to make full disclosure to their attorneys." *Fisher*, 425 U.S. at 403.

The privilege has always been available to corporations and other organizations[2] as well as to individuals. *United States v. Louisville & Nashville R.R.*, 236 U.S. 318; *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929; *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).[3] Yet, there are now diverse and con-

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[2] Indeed, the rule adopted by this Court for the application of the privilege to corporations is likely to be applied by the lower courts in the context of other organizations such as government agencies, labor unions, non-profit corporations, associations, partnerships and trusts. *See, e.g. Mead Data Central, Inc. v. United States Dept. of the Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977).

[3] *See also Bell v. Maryland*, 378 U.S. 226, 263 (Douglas, J., concurring); Proposed Federal Rules of Evidence, Rule 503(a)(1), 56 F.R.D. 183, 235 (1973); Uniform Rules of Evidence, Rule 502(a)(1) (National Conference of Commissioners on Uniform State Laws 1974); ALI, Model Code of Evidence, Rule 209(a) (1942). In fact, because of the widespread impact of corporate

flicting views among the federal courts on the scope of the corporate privilege. On the one hand, the court below, along with the Third and Tenth Circuits, adopted the narrow "control group" standard which limits the privilege to communications of employees, usually top management, who are in a position to control the corporation's response to the legal advice received.[4] On the other hand, recognizing that the control group test is not adequate to protect the purpose of the privilege, the Seventh and Eighth Circuits have adopted the broader "subject matter" test which applies the privilege to communications of an employee made at a supervisor's request for the purpose of securing legal advice for the company and relating

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activities and because of the complexity of the laws governing those activities, society has a substantial interest in preserving the privilege where corporate clients are concerned. *See, e.g., A. B. Dick Co. v. Marr,* 95 F. Supp. 83, 101-102 (S.D.N.Y. 1950).

4. *In re Grand Jury Investigation (Sun Company Inc.),* 599 F.2d 1224 (3d Cir. 1979); *Natta v. Hogan,* 392 F.2d 686 (10th Cir. 1968). It is arguable that the Tenth Circuit's finding in this regard is *dictum* since the test was applied without discussion (392 F.2d 692) and was not contested by the parties in the District Court. *Hogan v. Zletz,* 43 F.R.D. 308, 312-14 (N.D. Ok. 1967). Other cases utilizing the control group test include *In re Grand Jury Subpoena Dated December 19, 1978,* 81 F.R.D. 691 (S.D.N.Y. 1978), *rev'd on other grounds,* 599 F.2d 504 (2d Cir. 1979); *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.,* 68 F.R.D. 397 (E.D. Va. 1975); *United States v. IBM Corp.,* 66 F.R.D. 206 (S.D.N.Y. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.,* 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Industries, Inc. v. GAF Corp.,* 49 F.R.D. 82 (E.D. Pa. 1969), *aff'd without opinion,* 478 F.2d 1398 (3d Cir 1973); *Garrison v. General Motors Corp.,* 213 F. Supp. 515 (S.D. Cal. 1963); *City of Philadelphia v. Westinghouse Electric Corp.,* 210 F. Supp. 483 (E.D. Pa. 1962), *writ of mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick,* 312 F.2d 742 (3d Cir. 1963), *cert denied,* 372 U.S. 943.

to matters within the scope of the employee's duties.[5] Finally, some lower federal courts have utilized a variety of other formulae, including combinations of the two dominant tests.[6]

The control group test, which was formulated in a misguided effort to identify the employees who "personify"

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[5] *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 606 (8th Cir. 1978) *(en banc)*; *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970) *(per curiam), aff'd per curiam without opinion by an equally divided court,* 400 U.S. 348, *reh'g. denied,* 401 U.S. 950. Both the Seventh and Eighth Circuits require, *inter alia,* that the employee's communication be made at the direction of his superior. If applied literally, this requirement would impose a cumbersome and unnecessary step in the process by which corporations obtain legal advice and may interfere with the ability of the attorney to secure the information which is essential to insure that the advice the corporation receives is sound. *See* Parts II and III of this Brief, *infra.* The privilege should attach so long as the communication relates to matters within the scope of the employee's duties and is made to facilitate the rendition of legal advice to the corporation.

Other cases utilizing the subject matter test include *In re Grand Jury Subpoena Dated July 13, 1979,* 478 F. Supp. 368 (E.D. Wis. 1979); *In re D.H. Overmyer Telecasting Co., Inc.,* 470 F. Supp. 1250 (S.D.N.Y. 1979); *In re Ampicillin Antitrust Litigation,* 81 F.R.D. 377 (D.D.C. 1978); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.,* 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd,* 534 F.2d 330 (7th Cir. 1976); *Hasso v. Retail Credit Co.,* 58 F.R.D. 425 (E.D. Pa. 1973); *Panduit Corp. v. Burndy Corp.,* 172 U.S.P.Q. 46, 47 (N.D. Ill. 1971).

[6] *Perrignon v. Bergen Brunswig Corp.,* 77 F.R.D. 455 (N.D. Cal. 1978); *Hercules Inc. v. Exxon Corp.,* 434 F. Supp. 136 (D. Del. 1977); *Burlington Industries v. Exxon Corp.,* 65 F.R.D. 26 (D. Md. 1974); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F. Supp. 1146 (D.S.C. 1974); *Eutectic Corp. v. Metco, Inc.,* 61 F.R.D. 35 (E.D.N.Y. 1973).

a corporation, appears to have been based on a misunderstanding of the record and decision in *Hickman v. Taylor,* 329 U.S. 495.[7] It was adopted in contravention of the well-established rule that corporate clients could speak confidentially to their attorneys through authorized representatives, irrespective of the corporate rank of the representatives. *E.g., Zenith Radio Corp. v. Radio Corp. of America,* 121 F. Supp. 792, 795 (D. Del. 1954); *United States v. United Shoe Machinery Corp., supra,* 89 F. Supp. at 361; 8 Wigmore, *Evidence,* § 2317, p. 618 (McNaughton rev. ed. 1961).

Moreover, the courts adopting the control group test have failed to apply the functional analysis specified by this Court in *Fisher* and *Trammel.* Instead of focusing on the need to fashion a rule which insures that the purpose

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[7] The opinion in the original control group case, *City of Philadelphia v. Westinghouse Electric Corp.,* 210 F. Supp. 483, indicates that its conclusion was influenced by *dictum* in *Hickman v. Taylor,* 210 F. Supp. at 485. In *Hickman,* however, this Court specifically *declined* "to delineate the content and scope of the [attorney-client] privilege," 329 U.S. at 508, and held only that "the privilege does not extend to information which an attorney secures from a witness . . .," 329 U.S. at 508. The employees who were interviewed in *Hickman* had filed claims against their employer relative to the accident at issue in the case. *Hickman v. Taylor,* Record at 70a. While communications of a client's agent or representative are generally within the privilege (8 Wigmore, § 2317, p. 618), the privilege does not apply when the agent's interests are adverse to his principal, as they were in *Hickman. Becher v. United States,* 5 F.2d 45, 49 (2d Cir. 1924), *cert. denied,* 267 U.S. 602. The opinion in *Hickman* does not suggest that the Court meant to abrogate the privilege with respect to communications between a corporation's attorney and corporate employees possessing relevant factual information who are not members of the corporation's "control group".

of the privilege will be achieved when applied to corporations, the court below, and other courts adopting the control group test, have restricted the privilege based on perceived concerns unrelated to its purpose.

The control group test was adopted by the court below on the basis of the expressed concern that, unless the more restrictive test for application of the privilege were adopted, corporate managers would be encouraged to remain ignorant of "unpleasant facts which they should know." 600 F.2d at 1227. The Sixth Circuit's assertion is unjustified and unsupported.[8] In addition, when injected into an analysis of the scope of the attorney-client privilege, such concerns needlessly distort the analysis and erode the privilege to the detriment of its purpose.[9] By focusing upon the person with whom the attorney communicated rather than why the communication occurred, the control group test "inhibits the free flow of informa-

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8. In fact, application of the control group test is likely to restrict top management's knowledge of "unpleasant facts" because one of the best tools management has available to it to ferret out all relevant facts is the corporation's lawyers. If these lawyers are unable to investigate the facts under the protection of the attorney-client privilege, they will, as a practical matter, be precluded from keeping top management well-informed. *See* Parts II & III of this Brief, *infra*.

9. Such concerns are addressed appropriately in the context of developing case law respecting the duties of corporate officers and directors. The courts have not been hesitant to respond to claims seeking to interpret expansively the obligations of officers and directors. *See, e.g., United States v. Park*, 421 U.S. 658, 670-673 (Federal Food, Drug, and Cosmetic Act imposes upon corporate supervisors an affirmative duty to seek out and remedy violations and a duty to implement measures to insure that violations do not occur.) *See also, Gould v. American-Hawaiian Steamship Co.*, 535 F.2d 761 (3d Cir. 1976); *Escott v. Barchris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968) (directors personally liable for negligence in connection with false or misleading statements or omissions in proxy solicitations materials and registration statements.)

tion to a legal advisor and defeats the purpose of the attorney-client privilege." *Diversified Industries Inc. v. Meredith,* 572 F. 2d 596, 609 (8th Cir. 1978). Indeed, in adopting the control group test, the Third Circuit conceded that it "affords a corporation the minimum of protection. Although many have argued that the test's protection is inadequate, no one yet has criticized it as overly generous." *In re Grand Jury Investigation (Sun Company, Inc.),* 599 F.2d at 1235.[10]

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[10] The Third Circuit asserted that a broader privilege is unnecessary to encourage candid communication between the lawyer and lower level employees based on its view that the confidentiality afforded such communications would be "illusory" because of the possibility of waiver of the privilege by the corporation. *Sun Company, supra,* 599 F.2d at 1235.

The "waiver" theory as a basis for determining the scope of the privilege is not persuasive. First, the attorney-client privilege is seldom waived. Second, to the extent that the Third Circuit's assertion may have been prompted by a concern that corporate counsel will not properly discharge their responsibilities to individuals, such concern is unfounded. In fact, experience demonstrates that the opposite is true and that corporate counsel carefully guard the individual interests of the employee. *See, e.g., Handler v. SEC,* 610 F.2d 656, 660 n. 1 (9th Cir. 1979). Indeed, the control group test may exacerbate the problem of the individual's rights since, under the test, factual inquiries will be made by corporate superiors who will not be guided by a code of professional conduct in dealing with lower level employees.

Finally, the Third Circuit's conclusion that the same amount and quality of information will be available to the attorney under the control group standard as under the subject matter test focuses solely upon an employee's willingness to communicate with the corporate attorney and ignores the fact that the uncertain and narrow scope of the test significantly increases the likelihood that the corporation will decide against permitting any communication between attorney and employee to take place in the first instance. See Parts II & III of this Brief, *infra.*

As a consequence, the control group test should not be sustained. Rather, as *Trammel* and *Fisher* teach, the test for application of the privilege to corporations and other organizations must be designed to effectuate the purpose of the privilege.

II. IN ORDER TO ASSURE FULL DISCLOSURE OF INFORMATION BETWEEN CORPORATE CLIENTS AND ATTORNEYS THE TEST ADOPTED TO DEFINE THE SCOPE OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE MUST BE CONSISTENT WITH THE MANNER IN WHICH CORPORATIONS ARE HELD ACCOUNTABLE UNDER THE LAW AND THE WAYS IN WHICH CORPORATIONS FUNCTION.

A corporation is an artificial being. It has no means of acting or knowing independent of its agents. In *Philadelphia, Wilmington & Baltimore RR. v. Quigley*, 21 How. 202, 210, this Court recognized that axiom and the corresponding rule that corporations and organizations may be held accountable for the acts of their agents. Thus the doctrine of *respondeat superior* provides the basis for holding corporations and other organizations accountable to the persons and entities with which they deal. *Philadelphia, Wilmington & Baltimore R.R. v. Quigley*, 21 How. 202; *Lake Shore & Michigan Southern Ry. v. Prentice*, 147 U.S. 101; *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481; *United States v. A&P Trucking Co.*, 358 U.S. 121, 125.[11]

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[11] The doctrine of *respondeat superior* is clearly not confined to corporations, but is applicable to the entire spectrum of master-

Since a corporation may be held accountable for the acts and knowledge of lower-level employees, the corporation's attorney must be able to get facts directly from, and give legal advice directly to, such employees. Legal advice on liability -- and legal advice on preventive steps to avoid liability – can only be formulated and implemented through candid communication between the lawyer and the specific employee who creates the existing or potential legal risk. By restricting the privilege to communications between "top management" of a corporation and its attorneys, the narrow control group test clearly impedes this essential communication between the attorney and the corporate employee directly involved in the matter about which legal advice is sought. The test totally ignores the fact that legally binding acts and decisions take place throughout the corporate structure and that legal advice is, therefore, required by, and the facts on which that advice is based must be obtained from, individuals at all levels of the corporate structure. In contrast, the subject

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servant relationships. *See* 1 Restatement of Agency 2d, § 220 (1958). As such, the doctrine and the analysis of this Brief are not limited to corporations but are pertinent to the broad range of organizations and individuals who employ others to act on their behalf. Each of these organizations and individuals may be held criminally and civilly liable for the acts and knowledge of persons with whom they have a master-servant relationship. This principle was expressly recognized by this Court and the Congress in drafting the 1975 amendment to Federal Rule of Criminal Procedure 16(a)(1)(A) which provides for discovery by a defendant who is a "corporation, partnership, association or labor union" of grand jury testimony of witnesses who were, at the time of their testimony or the offense, officers or employees of the defendant organization.

matter test not only is geared to the purpose of the attorney-client privilege recognized by this Court but also is consistent with the manner in which corporations are held accountable under the law because it permits direct confidential access to those persons having knowledge of facts affecting the corporation's legal obligations.

The control group test also fails to take account of the ways in which modern corporations are organized and operate, and how they seek, assimilate and act upon legal advice. The Sixth Circuit's opinion is based upon the fundamental misconception that there is a definable "control group" in every corporation which is responsible for corporate action based upon legal advice. Indeed "it is only the senior management," the court below said, "which can be said to possess an identity analogous to the corporation as a whole." 600 F.2d at 1226. This view of the way corporations function gives undue emphasis to the legal fiction of the corporate entity and is contrary to the teaching and experience of authoritative corporate analysts who find that decisionmaking in today's corporation is decentralized.[12] As a practical matter, principal corporate executives are ordinarily not involved in the day-to-day operations of the corporation which may be the subject of legal

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12. A recent empirical study of manufacturing organizations found that decentralization is the most common organizational philosophy, not only in large, highly-diversified companies but also in relatively homogeneous businesses with smaller sales volumes. Vancil, *Decentralization: Managerial Ambiguity by Design* (Financial Executives Research Foundation 1979) at 1, 3, 25. The author concludes (*id.* at 25):

> If decentralization was a managerial invention in 1920, it was an articulated philosophy by 1950, a reorganizational trend by 1960, and a universal practice by 1970. Today, the issue for a manufacturing corporation of any size is not whether it should decentralize, but how much.

inquiry and advice.[13] In the decentralized decision-making which characterizes modern corporations, responsibility for corporate action may be delegated not only to divisions and departments, but also to lower level employees, such as contract administrators, and purchasing and sales personnel, who act for and bind the corporation in its relations with other parties.[14] Even when the ultimate decision is made by a corporate executive, preliminary legal consultation and analysis is frequently and necessarily delegated to subordinate personnel.[15]

Counsel should not be confronted with the dilemma inherent in the control group test of either advising the client without knowledge of all relevant facts, or of obtaining the necessary information from the client's agents and employees at the risk of having to divulge it to an adverse party. *Diversified Industries, Inc. v. Meredith*, 572

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13. *See, e.g., Modern Management, Issues and Ideas*, D.R. Hampton (ed.), Dickenson Pub. Co. (1975); Uyterhoeven, *General Managers In The Middle*, 50 Harv. Bus. Rev. 75 (1972); Vroom, *A New Look At Managerial Decision Making*, Organizational Dynamics-AMACOM (Spring 1973).

14. *See e.g.*, Stieglitz and Janger, *Top Management Organization in Divisionalized Companies*, Conference Board, Studies in Personnel Policy No. 195 (1965).

15. While a variety of models currently exist for corporate decision-making, nearly all stress a decentralized format for at least some of the important functions which characterize a diversified organization. Johnson, *Administrative Structure*, Supervisory Management 28, 29-31 March 1974; Drucker, *New Templates for Today's Organizations*, 52 Harv. Bus. Rev. 45 (1974); Goggin, *How the Multidimensional Structure Works at Dow Corning*, 52 Harv. Bus. Rev. 54 (1974); Sim, *Decentralized Management of Subsidiaries and Their Performance*, 17 Management Int'l Rev. 45 (1977); Sharon, *Decentralization of the Capital Budgeting Authority*, 25 Management Science 31 (1979); *End of the Era for Giant Computers*, 34 Int'l Management 33 (1979); Vancil & Lorange, *Strategic Planning in Diversified Companies*, 53 Harv. Bus. Rev. 81 (1975).

F.2d 596, 608-609 (8th Cir. 1978); *In Re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385-387 (D.D.C. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 145-146 (D. Del. 1977); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164-1165 (D.S.C. 1974). The Eighth Circuit identified this critical deficiency in the control group test in its decision in *Diversified Industries*, 572 F.2d at 608-609:

> The attorney dealing with a complex legal problem "is thus faced with a 'Hobson's choice.' If he interviews employees not having the 'very highest authority', their communications to him will not be privileged. If, on the other hand, he interviews *only* those with the 'very highest authority,' he may find it extremely difficult, if not impossible, to determine what happened." [citation] Thus, the control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege.

The suggestion in the opinion below that the control group test is necessary to avoid the possibility of counsel being the "exclusive repository of unpleasant facts" leading to the creation of a broad "zone of silence," 600 F.2d at 1227, is unwarranted and ignores the reality that the subject matter test protects only communications with counsel and does not prevent discovery of the underlying facts known by corporate agents and employees. *See, e.g., Grant v. United States*, 227 U.S. 74, 79; *Balistrieri v. O'Farrell*, 57 F.R.D. 567 (E.D. Wis. 1972); *Standard Pressed Steel Co. v. Astoria Plating Corp.*, 162 U.S.P.Q. 441, 13 F.R. Serv. 2d 844 (N.D. Ohio 1969); *Lance, Inc. v. Ginsburg*, 32 F.R.D. 51 (E.D. Pa. 1962); *City of Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830 (E.D. Pa. 1962). In *Westinghouse*, 205 F. Supp. at 831, the court explained:

> [T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing

> and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?," but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.[16]

The subject matter test, focusing upon attorney-employee communications relating to the scope of the employee's duties and made for the purpose of rendering advice to the corporation, has been delineated carefully to accomplish the purpose of the privilege while guarding against obstruction of discovery efforts. *See generally* 2 Weinstein & Berger, *Weinstein's Evidence*, ¶ 503(b)[04], p. 503-47 (1979). Moreover, the burden of proof is on the corporation asserting the privilege to establish each element of the privilege and other generally applicable requirements of the attorney-client privilege remain operative under the subject matter test. *See* the eight requirements listed at 8 Wigmore, § 2292, p. 554. Thus, contrary to the Sixth Circuit's assumption, under the subject matter

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[16] In civil cases, the subject matter test does not change the fact that the full panoply of discovery devices made available by the Federal Rules of Civil Procedure may be used by parties opposing a corporate client to discover facts which may also have been communicated to counsel. Thus, an adversary may submit interrogatories to the company under Civil Rule 33 which will require the company to respond with the collective knowledge of its agents and employees; the adversary may seek production of corporate documents under Civil Rule 34; and the adversary may depose employees under Civil Rule 30.

In short, an adversary party is in the same position, no better and no worse, than if the corporation had not sought legal advice with respect to the matter at issue. The only "burden" the privilege imposes is that of requiring each party to do its own discovery.

test the attorney-client privilege is applied to corporations only "where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403.

The control group test recognizes the existence of a privilege for corporate clients but strips it of meaningful content by requiring top management to act as a funnel through which all facts and legal advice must flow. Under the control group test, fact-finding on which legal advice is to be premised either will not be performed or will be performed by corporate managers who do not fully appreciate what facts to look for or the legal significance of facts brought to their attention. The control group test places attorneys who represent corporations and other organizations in an untenable professional position. It discourages corporations from seeking legal advice in the first instance;[17] it requires attorneys to give legal advice based on inadequately developed facts filtered through senior management;[18] and it prevents attorneys from communi-

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17. One commentary concludes that, under the control group test, corporate managers will frequently decide not to seek a legal opinion since control group members will be unable to spare the time to do the factfinding prerequisite to the rendition of legal advice and they will not want to take the disclosure risks entailed in having legal counsel do the factfinding. *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1292 (1979).

18. The importance of thorough factual development as a predicate to the giving of legal advice is illustrated by a number of this Court's recent opinions in the antitrust field which have incorporated extensive factual analyses. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1; *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36; *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602; *United States v. General Dynamics Corp.*, 415 U.S. 486.

cating legal advice directly to lower level employees so as to insure that the advice is understood and applied.

III. IN ORDER TO ASSURE FULL DISCLOSURE OF INFORMATION BETWEEN CORPORATE CLIENTS AND ATTORNEYS THE TEST ADOPTED TO DEFINE THE SCOPE OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGES MUST BE CAPABLE OF PROSPECTIVE APPLICATION.

The rationale of the privilege, that it induces disclosures "which might not have been made absent the privilege," *Fisher*, 425 U.S. at 403, presumes knowledge at the time the communication is made that it will be accorded protection. Under the control group test, however, neither counsel nor the client will be able to ascertain with certainty at the time a communication is made whether it can be protected. Indeed, the test is so uncertain as to make prospective determination of its application impossible.

The decision of the court below demonstrates the definitional problems presented by the control group test. While acknowledging that communications of "top management" qualify for protection under the test, the Sixth Circuit declined to rule outright that Upjohn's chairman, vice chairman, and president were members of its control group. Rather, the court found it necessary to remand the case for the determination of that question. Nothing illustrates more vividly the predicament of corporate counsel attempting to advise a client with respect to the confidentiality of communications from employees than the Sixth Circuit's reluctance to commit itself to a definite answer on this question.

Uncertainty of the type demonstrated by the opinion of the court below has marred the operation of the control

group test in the courts since its inception.[19] Eighteen years after its development, there is no consensus as to whether the test is static or flexible, *i.e.*, whether "control group" denotes a single immutable set of individuals within each corporation or whether the identity of "control group" members may shift within a single corporate organization and even within the context of a single legal problem. Corporate attorneys frequently are confronted with situations in which they are asked to investigate what initially appears to be a legal problem confined to one division or office of the company but which, upon careful investigation, is found to have company-wide implications. Communications at the initial stages of legal fact-finding between counsel and personnel from the division or office in which the problem was first recognized may be essential to the legal advice ultimately given to the corporation and should, therefore, be entitled to as great a degree of protection as communications subsequently made by corporate personnel occupying positions of company-wide responsibility. However, under the control group test the attorney in this situation is unable to advise his clients with any certainty that such communications will be privileged.

By the very nature of the control group test, its application cannot be determined *except* on an after-the-fact basis. The test virtually compels conscientious corporate counsel to disclose, at the time a request for legal advice is initiated, that they can give no assurances as to which communications ultimately will be privileged if fact-finding is pursued. Such disclosure will undoubtedly cause

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19. 2 Weinstein & Berger, *Weinstein's Evidence* ¶503(b)[04] at 503-43 (1979); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement,* 91 Harv. L. Rev. 464, 474 (1977); Note, *Evidence – Privileged Communications – The Attorney-Client Privilege In The Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. 360, 373 (1970).

clients to behave as if the privilege will not attach, resolving the uncertainty by not fully disclosing relevant information. Hence, the quality of legal advice which ensues will suffer. In short, the control group test cannot promote a full and candid flow of information from corporate client to attorney since it reinforces, rather than removes, "the apprehension of compelled disclosure." 8 Wigmore, § 2291, p. 545.

The subject matter test comports with the purpose of privilege because it enables clients and attorneys to predict in advance, with the necessary degree of certainty, what communications will be privileged. Instead of using an ill-defined concept such as "control group," the test considers whether an employee, irrespective of rank, made a disclosure for the purpose of aiding the corporation to obtain legal advice and whether the disclosure related to the scope of his employment, concepts familiar to judges and attorneys and, therefore, capable of prospective application.

IV. UNNECESSARY AND ARTIFICIAL RESTRICTIONS ON THE SCOPE OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE WILL ONLY SERVE TO IMPEDE VOLUNTARY COMPLIANCE WITH THE LAW BY CORPORATIONS.

Regulatory activity affecting corporations and other organizations has increased geometrically in the past decade. This growth is evidenced by the rapid increase in the number of regulatory agencies,[20] regulations, and regula-

[20] Twenty new federal regulatory agencies were established in the ten-year period from 1970 to 1980, the largest growth in number of federal regulatory agencies in any decade. Chilton, *A Decade of Rapid Growth in Federal Regulations*, Center for the Study of American Business, Washington University (March 13, 1979), *as reprinted in* Hearings Before The Committee on Governmental Affairs, United States Senate, 96th Cong., 1st Sess., on S. 445 and Title V of S. 2, May 23 and June 15, 1979, at 84, 86.

tory statutes. The regulations being promulgated by the federal government today, as well as those promulgated by state and local governments, are increasingly inscrutable to the layman.[21] They are ever more complex and detailed in language and application, affecting every level of operations within a business enterprise.[22]

In this highly developed regulatory environment, the skill of corporate attorneys, acting as counselors and advisors, is indispensable to voluntary compliance by corporations with the law. Governmental agencies admit that they lack the manpower required to enforce the multifarious laws and regulations falling under their jurisdiction and that they are dependent upon voluntary compliance efforts of corporations, aided by knowledgeable, responsible and well-informed legal advisors, to achieve such enforcement.[23]

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21. In setting out to study the question of how federal regulations affect the manufacturing phases of the iron and steel industry, the Council on Wage and Price Stability recently found that the regulatory agencies themselves could not offer any guidance as to which regulations were applicable. Council on Wage and Price Stability, *Catalog of Federal Regulations Affecting the Iron and Steel Industry*, (Dec. 1976) at v.

22. In reviewing how a single agency, the Occupational Safety and Health Administration (OSHA), affects a single industry, the Council on Wage and Price Stability stated, "OSHA tells the iron and steel industry what its ladders must look like, what its factory workers must wear, where and under what conditions various things must be stored, what kind of fire extinguishers must be used . . . ." *Catalog of Federal Regulations, supra* n. 21, at iv-v. Clearly, compliance with regulations of the type referred to by the Council may not be ascertained by consulting with "senior management" alone.

23. *E.g.*, Shenefield, *Compliance Programs as Viewed from the Antitrust Division*, 48 Antitrust L.J. 73 (1979) (hereinafter "Shene-

In response to the complex of regulation which envelops them, corporations have been calling upon their attorneys to do more than simply advise management with respect to regulatory developments and the interpretation of those developments. Increasingly, corporations and their counsel have turned to comprehensive and sophisticated programs for ensuring that regulatory directives are carried out in the particular circumstances of the activities engaged in by the corporation, at whatever level those regulatory directives may be operative, from the boardroom at corporate headquarters to the broom closet at the company's smallest and most remote plant. These salutary programs require corporate attorneys to render prescriptive as well as proscriptive advice and to do so with reference to the particular facts and circumstances of the client's operations. Such programs fall under the broad category of voluntary compliance efforts.

In addition to the ongoing compliance efforts of corporations in federal taxation matters, corporations use such voluntary compliance programs with frequency in

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field") ("the private bar is the front line of antitrust enforcement") (Mr. Shenefield, now Associate Attorney General, was the Assistant Attorney General in charge of the Justice Department's Antitrust Division); Weiss, *The EPA Tries to Woo Business*, Dun's Review (April 1978) (reporting comments of Environmental Protection Agency Administrator Douglas Costle). *See also* Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Law. 901, 913-914 (1969) (private attorneys are the "primary agents of law enforcement" with respect to "[s]ecurities law (both federal and state), corporate tax, antitrust law of all kinds, utilities regulation . . . .").

the areas of antitrust,[24] environment,[25] and securities.[26] The architects and proponents of such programs stress that they require a free and candid flow of information between the corporate attorney and all levels of both management and non-management personnel whose duties may be affected by the regulations with respect to which advice or compliance counseling is sought.[27]

Many voluntary compliance programs are initiated in the absence of either the threat of potential litigation or any suspicion of wrongdoing.[28] Many have been integrated

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24. Ellis, *Preventive Antitrust* (ABA National Institute 1979); Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity*, 34 Bus. Law. 1797, 1824 (1979); Shenefield, *supra* n. 23; Anderson, *Effective Antitrust Compliance Programs and Procedures*, 18 Bus. Law. 739 (1963); Hale, *Antitrust Audits*, 1 Corp. Prac. Com. 17 (1959).

25. Forrow, *supra* n. 24, 34 Bus. Law. at 1805; Weiss, *The EPA Tries to Woo Business*, *supra*, n. 23 at 87.

26. *What the SEC Expects From Corporation Lawyers*, Fortune, Oct. 23, 1978, at 143; Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 Bus. Law. 5 (1979); Kennedy & Simon, *An Examination of Questionable Payments and Practices*, Praeger Publishers, New York (1978).

27. *E.g.*, Shenefield, *supra* n. 23, 48 Antitrust L.J. at 77 ("the antitrust counsel should have the freedom to move throughout the company to audit compliance"). Hale, *supra* n. 24, 1 Corp. Prac. Com. at 19; Forrow, *supra* n. 24, 34 Bus. Law. at 1805; Daniel, Fedders & Schweitzer, *The Internal Investigation*, Parallel Grand Jury and Administrative Agency Investigations, Tab G-1 at p. 19 (ABA National Institute 1978); Anderson, *supra* n. 24, 18 Bus. Law. at 741, 743, 746-747; Ellis, *Preventive Antitrust*, *supra* n. 24.

28. Hence, communications made in connection with such programs would not qualify for protection under the work-product doc-

into ongoing corporate training programs during which employees are encouraged to seek advice concerning specific fact situations. Such programs are clearly threatened by the control group test. While no one would argue that corporations will not continue to seek the advice of counsel in connection with compliance efforts, the scope and quality of counseling and, thereby, the level of compliance by corporations with the many laws governing their activities, will inevitably suffer.

This important relationship between the scope of the privilege and compliance by corporations with laws dependent for their enforcement on the responsibility and advice of corporate counsel was described in *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1165-65 (D.S.C. 1974), as follows:

> [T]he only way that a lawyer can really understand how a corporation operates, what it is doing, and what it can do within the confines of the antitrust laws, is to go out into the branch offices and into the field to make the rounds with the salesmen. After the lawyer forms his or her opinion, it is of no immediate benefit

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trine, discussed in Part V of this Brief, *infra*. Some courts adopting the control group test appear to have been unduly and improperly influenced by the availability of work-product protection in the cases before them. *E.g., In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (3d Cir. 1979). In *Sun*, the Third Circuit also stated that adoption of the control group test would not significantly deter a corporation from conducting an internal investigation because "the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential." 599 F.2d at 1237. This statement may have been influenced by the fact that, in *Sun*, evidence of wrongdoing was brought to management's attention, raising the possibility of personal liability if an investigation was not undertaken. This factor is not present in many voluntary compliance settings.

> to the chairman of the board or the president. It must be given to the corporate personnel who will apply it. If an attorney cannot make inquiries of salesmen and if the attorney cannot give advice to the corporate personnel who will apply it, then a corporation would be reluctant to seek legal advice since its confidential communications would not be protected by the attorney-client privilege. This court recognizes that it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients.[29]

The subject matter test encourages corporate compliance programs because it enables corporate managers to direct middle management and lower-level employees to communicate freely with corporate attorneys without fear of having the results of such discussions served up on a silver platter to litigation-minded adversaries. By failing to focus on the need for full disclosure between the attorney and employees throughout the corporation, the court below adopted a test which would destroy one of the key societal benefits of the privilege, that of fostering voluntary compliance efforts by corporate clients.

V. AN ATTORNEY SHOULD NOT BE REQUIRED TO PRODUCE MATERIAL PREPARED IN ANTICIPATION OF LITIGATION IN RESPONSE TO AN ADMINISTRATIVE SUMMONS WITHOUT A DEMONSTRATION OF NEED.

In a single footnote, the court below brushed aside the right of individual and corporate taxpayers to protect

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[29] *See also,* Report of Committee on the Federal Courts of the New York County Lawyers Association 7-10 (April 1970), quoted in 2 Weinstein & Berger, *Weinstein's Evidence,* ¶503[01], p. 503-12 n. 1 (1979); Pye, *the Attorney-Corporate Client Privilege,* 15 Prac. Law. 15, 19 (1969); Burnham, *Confidentiality and the Corporate Lawyer,* 56 Ill. B. J. 542, 548 (1968); Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation,* 50 So. Cal. L. Rev. 303, 309 (1977).

materials prepared in anticipation of litigation from discovery pursuant to administrative summons. The Sixth Circuit held that the work-product doctrine developed in *Hickman v. Taylor,* 329 U.S. 495, is not applicable to IRS administrative summonses. 600 F.2d at 1228 n. 13. That conclusion is demonstrably wrong and should be reversed.

The administrative summons was issued by an IRS Special Agent to Upjohn's General Counsel, Gerard Thomas, a petitioner herein, under 26 U.S.C. § 7602.[30] It is undisputed that the summons specifically required production of confidential materials prepared in anticipation of litigation involving, *inter alia,* securities and tax issues. The materials requested by the IRS, witness statements and interviews, are precisely those which are central to the attorney-advocate's preparation of his case.[31] Thorough,

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30. Section 7602 provides, in pertinent part:

> "For the purpose of ascertaining the correctness of any return, . . . the Secretary or his delegate is authorized –
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person . . . to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry. . . ."

31. Applying the work-product doctrine to a grand jury investigation, the District Court noted in *In re Terkeltoub,* 256 F. Supp. 683, 685 (S.D.N.Y. 1966):

> At the heart of the job of "thorough-going investigation and preparation" is the interviewing of prospective witnesses, hostile as well as friendly. And no lawyer, on any side of any case, would consider it salutary for his client that the opposition knew who was being interviewed and what was being said during such meetings. If vivid illustration were needed, it is supplied every day in this courthouse by the Government's stout resistance to discovery efforts by defendants in criminal cases.

efficient, and uninhibited trial preparation is the objective the work-product doctrine fosters. The doctrine is essential to "the orderly prosecution and defense of legal claims." 329 U.S. at 510.

A summons issued by a Special Agent of the IRS Criminal Investigation Division can lead to further civil or even criminal proceedings. See *United States v. LaSalle National Bank,* 437 U.S. 298. Indeed, the far-reaching investigative powers of the IRS under 26 U.S.C. § 7602 have been likened in breadth to that of a grand jury. *United States v. Powell,* 379 U.S. 48, 57; *United States v. Amerada Hess Corp.,* 80-1 U.S.T.C. ¶ 9160 (3d Cir. 1980); *United States v. Matras,* 487 F.2d 1271 (8th Cir. 1973). Nevertheless, the § 7602 summons power is "subject to the traditional privileges and limitations." *United States v. Euge,* ..... U.S. ....., 100 S. Ct. 874, 879. See also, *Reisman v. Caplin,* 375 U.S. 440. *Donaldson v. United States,* 400 U.S. 517, 528-529; *United States v. Powell,* 379 U.S. at 58. The witness who has been summoned "may challenge the summons on any appropriate ground" – including, but not limited to, the defense that the material sought "is protected by the attorney-client privilege." *Reisman v. Caplin,* 375 U.S. at 449.

Moreover, in addition to the fact that *Euge, Reisman* and *Donaldson,* strongly suggest that the work-product doctrine is available as a defense to an administrative summons, three courts have squarely so held. *United States v. Amerada Hess Corp.,* 80-1 U.S.T.C. ¶ 9160 (3d Cir. 1980); *United States v. Brown,* 478 F.2d 1038 (7th Cir. 1973); *United States v. Lipshy,* 79-2 U.S.T.C. ¶ 9628 (N.D. Tex. 1979). Only one court, other than the court below, has indicated that it "doubted" that the doctrine applies. *United States v. McKay,* 372 F.2d 174, 176 (5th Cir. 1967). That *dictum,* rather than the clear authority to the contrary, was relied on by the court below. 600 F.2d at 1228 n.13.

The reliance is misplaced. The Fifth Circuit's statement was based on a now demonstrably erroneous assump-

tion: that the work-product doctrine is inapplicable to grand jury proceedings. *McKay,* 372 F.2d at 176. There is now almost universal acceptance by the lower federal courts of the applicability of the work-product doctrine to grand jury investigations.[32] In fact, this clear authority applying the doctrine to grand juries has undermined the Fifth Circuit's *McKay dictum* to such a degree that a District Court within that Circuit recently concluded that *McKay* did not bar it from applying the doctrine to an IRS summons. *United States v. Lipshy, supra,* 79-2 U.S.T.C. ¶ 9628 at pp. 88, 280-281.

In its opinion in *United States v. Amerada Hess Corp.,* issued after this case was decided by the Sixth Circuit, the Third Circuit found that the analogy of IRS investigatory powers to grand jury proceedings (an analogy endorsed by the Government at page 28 of its brief submited to the court below) compels the conclusion that the doctrine may be invoked as a defense to an IRS summons, 80-1 U.S.T.C. ¶ 9160 at p. 83, 177:

> The government's argument for its inapplicability to IRS summons proceedings is predicated upon the inquisitorial, rather than adversarial, nature of those proceedings. Grand jury investigations are equally inquisitorial, and the interest of the federal government in discovering instances of violations of the criminal

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32. *In re Grand Jury Investigation (Sun Company, Inc.),* 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Subpoena Dated December 19, 1978,* 599 F.2d 504 (2d Cir. 1979); *Velsicol Chemical Corp. v. Parsons,* 561 F.2d 671 (7th Cir. 1977), *cert. denied,* 435 U.S. 942; *In re Grand Jury Proceedings (Duffy),* 473 F.2d 840 (8th Cir. 1973); *In re Grand Jury Investigation (Sturgis),* 412 F.Supp. 943 (E.D. Pa. 1976); *In re Grand Jury Subpoena (Rosenbaum),* 401 F.Supp. 807 (S.D.N.Y. 1975); *United States v. Mitchell,* 372 F.Supp. 1239 (S.D.N.Y.), *app. dism'd,* 485 F.2d 1290 (2d Cir. 1973); *In re Terkeltoub,* 256 F.Supp. 683 (S.D.N.Y. 1966). *Duffy* and *Terkeltoub* were cited favorably by this Court in *United States v. Nobles,* 422 U.S. 225, 238 n. 12.

> law is at least as great as its interest in discovering amounts due to it under the Internal Revenue Code. It would be quite anomalous to hold that the work product rule applied to a grand jury inquisition, but not to an IRS section 7602 inquisition.

The effect of the holding below is to penalize and, hence, discourage, the thorough preparation of administrative cases. The handicap it imposes on administrative litigants and their attorneys is unique and unprecedented in other civil and criminal discovery proceedings. Concurring in *Hickman,* Mr. Justice Jackson described the effect of such a ruling, 329 U.S. at 514-515:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the everchanging and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

The handicap imposed on administrative litigants by the court below is clearly unwarranted because the work-product doctrine itself incorporates limitations which are adequate to safeguard an agency's discovery requirements. The doctrine permits discovery of materials prepared in anticipation of litigation upon a showing of need therefor. *Hickman,* 329 U.S. at 511-512; Federal Rule of Civil Produre 26(b)(3). When applied to an administrative summons, the work-product doctrine simply requires the government to demonstrate what any other litigant must

demonstrate: its need for an attorney's trial preparation materials.[33]

The government can make no credible argument, aside from its own administrative convenience, to justify dispensing with the policy of the work-product doctrine and granting it discovery rights superior to that of a grand jury.[34] In *United States v. Nobles,* 422 U.S. 225, 238, this Court saw no reason to limit application of the work-product doctrine to civil proceedings, saying "its role in assuring the proper functioning of the criminal justice system is even more vital." An administrative summons, issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602, must be governed by the same policies if the right to the meaningful assistance of counsel is to be preserved in administrative investigations as well as in judicial proceedings.

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33. Recognizing that the doctrine may be applicable, the government, in the court below, argued that it had demonstrated necessity because, *inter alia,* a number of persons interviewed by Upjohn's counsel were located abroad and the witnesses might be reluctant or hostile to respond to IRS questioning. The Sixth Circuit did not reach this issue but similar claims have recently been rejected by the Second and Third Circuits in grand jury cases where the government had made no reasonable effort to secure the testimony of witnesses. *In re Grand Jury Investigation (Sun Company, Inc.)* 599 F.2d at 1232-1233; *In re Grand Jury Subpoena Dated December 19, 1978,* 599 F.2d at 512-513.

34. *Cf. United States v. Coopers & Lybrand,* 550 F.2d 615, 621 (10th Cir. 1977) ("Mere convenience does not make an item producible under an IRS summons"); *United States v. Matras,* 487 F.2d 1271, 1275 (8th Cir. 1973) ("The term 'relevant' [in § 7602] connotes and encompasses more than 'convenience' ").

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed and enforcement of the summons denied in all respects.

Respectfully submitted,

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